

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**K.D., Appellant**

**and**

**U.S. POSTAL SERVICE, LAKE GENEVA POST  
OFFICE, Lake Geneva, WI, Employer**

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**Docket No. 19-1542  
Issued: September 8, 2020**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On July 11, 2019 appellant filed a timely appeal from a June 17, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> The Board notes that following the June 17, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated September 2, 2020, the Board exercised its discretion and denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 19-1542 (issued September 2, 2020).

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

## **FACTUAL HISTORY**

On August 29, 2018 appellant, then a 57-year-old sales distribution clerk, filed an occupational disease claim (Form CA-2) alleging that he began experiencing a rapid heartbeat and palpitations and getting no sleep as a result of factors of his federal employment, including being mistreated, falsely accused of badgering new clerks who had transferred from other post offices when he attempted to show them proper procedures, and was subsequently suspended without pay by postmaster S.S. Appellant noted that he first realized his condition was caused or aggravated by his federal employment on August 22, 2018. On the reverse side of the claim form, the employing establishment indicated that he stopped work on August 20, 2018 and returned on September 5, 2018. It also indicated that it was controverting appellant's claim.

On August 23, 2018 S.S. requested discipline for appellant due to an August 20, 2018 incident during which he alleged that appellant was engaging in inappropriate conduct including harassing, bullying, and engaging in threatening behavior with a coworker as well as becoming insubordinate with his postmaster. He noted that he had repeatedly directed appellant to cease instructing other employees regarding their work duties. S.S. further asserted that appellant disobeyed a direct order to be quiet and leave. He noted that appellant failed to follow these instructions four times which resulted in a call to the police. As a result of this conduct, appellant was put on "Emergency Placement." He noted that appellant reported for a predisciplinary investigation on August 22, 2018. S.S. requested to issue a notice of removal.

In a letter dated August 29, 2018, S.S. notified appellant of his seven-day suspension due to the events of August 20, 2018. He found that appellant had yelled at T.R., a coworker, and had accused her of lying about him. S.S. noted that appellant had continued to yell when he asked him to stop. He reported that he had instructed appellant to stop yelling or he would have to put him on emergency placement. Appellant had continued to "rant and rave" at which time S.S. had told him to "Shut up and leave." After appellant returned from lunch, S.S. had conducted a discussion with appellant in his office. He had eventually again instructed appellant to leave the building. Appellant had refused. After three similar instructions, S.S. had called the police who escorted appellant from the premises. On August 31, 2018 the employing establishment and union settled appellant's grievance regarding the emergency seven-day suspension as the result of the events of August 20, 2018. Appellant was returned to work on September 3, 2018 with no back pay for lost wages.

In a September 19, 2018 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence needed to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In a statement of certification dated September 30, 2018, appellant attached a copy of OWCP's September 19, 2018 development letter and wrote "false" or "unfair" beside each of the references to specific evidence submitted by the employing establishment. He indicated that all the statements submitted by the employing establishment were untrue, but had caused him stress.

Appellant sought treatment on August 22, 2018 from Dr. Christopher M. Tanner, a physician specializing in emergency medicine, due to heart palpitations and frequent sensations of a racing heart, which he attributed to stress. Dr. Tanner diagnosed premature atrial contractions.

On August 23, 2018 appellant sought medical treatment from Dr. Kenneth B. Bortin, a Board-certified cardiologist, due to heart palpitations and intermittent dizziness. Dr. Bortin noted that appellant reported stress at work and diagnosed premature ventricular contractions, premature atrial contractions, hypertension, and abnormal electrocardiogram.

By decision dated November 5, 2018, OWCP denied appellant's emotional condition claim finding that he had not established the factual elements of his claim, noting that he had not provided a factual statement or a response to the development questionnaire.

On November 9, 2018 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He provided a written statement and asserted that S.S. had caused him great stress.

A hearing was held before an OWCP hearing representative on April 9, 2019. Appellant testified that on August 20, 2018 he was helping new employees to scan packages that would not scan. He reported that full-time clerks were expected to train the new employees. Appellant alleged that S.S. began to treat him differently than the new female employees, yelling at him, as well as throwing a clipboard and his telephone. He testified that S.S. cursed frequently. Appellant noted that S.S. accused him of badgering the other employees, but denied this, noting that he was trying to teach them. He testified that one of the supervisors had been promoted from clerk and that it was hard to work with people who were promoted from within. Appellant alleged that T.R. had told the supervisor that he was badgering other employees and that on August 20, 2018 he told her that he did not appreciate her lying about him. S.S. overheard this conversation and yelled at appellant to "shut up." Appellant objected and protested that he had sacrificed for his job and was merely "saying something about this person lying on me." S.S. informed him that if he said another word he would suspend him. Appellant then walked away and went to lunch. When he returned, S.S. informed him that he was sending him home for a week. Appellant raised this issue with the union and S.S. reported that appellant did not seem remorseful. He alleged that he had lost sleep, that his blood pressure was unregulated, and that he sought medical treatment on August 22, 2018 after he was told that he could not return to work.

Appellant further testified that he was the only man in the office and that S.S. treated him differently from the women. He alleged that S.S. called the women in the office and asked if they had a problem with appellant. Appellant further asserted that S.S. had lied to him about his work schedule.

By decision dated June 17, 2019, OWCP's hearing representative affirmed the November 5, 2018 decision as modified. He denied appellant's emotional condition claim, finding that appellant had not factually established gender-based disparate treatment or that S.S. had yelled at appellant on August 20, 2018. The hearing representative further found that the emergency removal of appellant, while substantiated as factual, did not constitute error or abuse.

## **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>4</sup> has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>5</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>6</sup>

To establish an emotional condition in the performance of duty, a claimant must submit: (1) factual evidence identifying an employment factor or incident alleged to have caused or contributed to his or her claimed emotional condition; (2) medical evidence establishing that he or she has a diagnosed emotional or psychiatric disorder; and (3) rationalized medical opinion evidence establishing that the accepted compensable employment factors are causally related to the diagnosed emotional condition.<sup>7</sup>

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.<sup>8</sup> On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment, or to hold a particular position.<sup>9</sup>

A claimant has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the condition for which he or she claims compensation was caused or adversely affected by employment factors.<sup>10</sup> This burden includes the submission of a detailed description of the employment factors or conditions which he or she believes caused or adversely

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<sup>4</sup> 5 U.S.C. § 8101 *et seq.*

<sup>5</sup> A.J., Docket No. 18-1116 (issued January 23, 2019); Gary J. Watling, 52 ECAB 278 (2001).

<sup>6</sup> 20 C.F.R. § 10.115(e); M.K., Docket No. 18-1623 (issued April 10, 2019); T.O., Docket No. 18-1012 (issued October 29, 2018); Michael E. Smith, 50 ECAB 313 (1999).

<sup>7</sup> S.K., Docket No. 18-1648 (issued March 14, 2019); M.C., Docket No. 14-1456 (issued December 24, 2014); Debbie J. Hobbs, 43 ECAB 135 (1991); Donna Faye Cardwell, 41 ECAB 730 (1990).

<sup>8</sup> Lillian Cutler, 28 ECAB 125 (1976).

<sup>9</sup> A.E., Docket No. 18-1587 (issued March 13, 2019); Gregorio E. Conde, 52 ECAB 410 (2001).

<sup>10</sup> B.S., Docket No. 19-0378 (issued July 10, 2019); Pamela R. Rice, 38 ECAB 838, 841 (1987).

affected a condition for which compensation is claimed, and a rationalized medical opinion relating the claimed condition to compensable employment factors.<sup>11</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

Appellant alleged that he sustained an emotional condition as a result of several employment factors. The Board must initially review whether these alleged incidents and conditions of employment are compensable employment factors under the terms of FECA. The Board notes that appellant's allegations do not pertain to his regular or specially assigned duties under *Cutler*.<sup>12</sup> Rather, appellant has alleged error and abuse in administrative matters and harassment/discrimination on the part of S.S., his postmaster.

Appellant has asserted that S.S. improperly suspended him based on the August 20, 2018 incident with T.R., and improperly refused to allow him to return to work on August 22, 2018.

The Board has long held that disciplinary<sup>13</sup> matters are administrative or personnel matters which, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.<sup>14</sup> However, the Board has also held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative/personnel matter, coverage will be afforded.<sup>15</sup> In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.<sup>16</sup>

The Board finds that appellant has not submitted sufficient evidence to establish error or abuse with respect to administrative/personnel matters. Appellant did not provide any evidence corroborating his versions of the events of August 20 or 22, 2018. He did not demonstrate error or abuse through the submission of the final findings regarding his grievance.<sup>17</sup> Although appellant expressed dissatisfaction with the supervisory actions of S.S., the Board has held that mere dislike or disagreement with certain supervisory actions will not be compensable absent error or abuse on the part of the supervisor.<sup>18</sup>

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<sup>11</sup> *P.B.*, Docket No. 17-1912 (issued December 28, 2018); *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

<sup>12</sup> *Supra* note 8.

<sup>13</sup> *G.R.*, Docket No. 18-0893 (issued November 21, 2018).

<sup>14</sup> *T.L.*, Docket No. 18-0100 (issued June 20, 2019); *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

<sup>15</sup> *S.K.*, Docket No. 18-1648 (issued March 14, 2019); *William H. Fortner*, 49 ECAB 324 (1998).

<sup>16</sup> *J.W.*, Docket No. 17-0999 (issued September 4, 2018); *Ruth S. Johnson*, 46 ECAB 237 (1994).

<sup>17</sup> *M.R.*, Docket No. 18-0304 (issued November 13, 2018).

<sup>18</sup> *F.W.*, Docket No. 19-0107 (issued June 10, 2020); *T.C.*, Docket No. 16-0755 (issued December 13, 2016).

Appellant also alleged that S.S. subjected him to discrimination by treating him differently from the women. To the extent that disputes and incidents alleged as constituting harassment or discrimination are established as occurring and arising from an employee's performance of his or her regular duties, these could constitute employment factors.<sup>19</sup> Mere perceptions are not compensable under FECA and harassment can constitute a factor of employment if it is shown that the incidents constituting the claimed harassment actually occurred.<sup>20</sup> The Board finds that appellant submitted no evidence corroborating his allegations of discrimination.<sup>21</sup> Appellant did not submit witness statements or other documentary evidence demonstrating that the alleged discrimination occurred as alleged.<sup>22</sup>

As appellant has not substantiated his allegations with probative evidence, he has not established a compensable employment factor under FECA with respect to the claimed discrimination. The Board thus finds that appellant has not met his burden of proof to establish his emotional condition claim.<sup>23</sup>

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish an emotional condition in the performance of duty, as alleged.

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<sup>19</sup> *D.B.*, Docket No. 18-1025 (issued January 23, 2019); *David W. Shirey*, 42 ECAB 783, 795-96 (1991).

<sup>20</sup> *Id.*

<sup>21</sup> *F.K.*, Docket No. 17-0179 (issued July 11, 2017).

<sup>22</sup> *B.S.*, *supra* note 10.

<sup>23</sup> As appellant has not established a compensable employment factor, the Board need not address the medical evidence of record. *See B.O.*, Docket No. 17-1986 (issued January 18, 2019); *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 17, 2019 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2020  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board